In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 479

EMANUEL STAVROS HOUVARDAS,
Petitioner,

vs.

I. F. WIXON, District Director of Immigration and Naturalization,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Emanuel Stavros Houvardas, respectfully states and alleges:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner is an alien who has resided continuously in California since 1912 after legally entering the United States from the Island of Samos, Greece.

On March 18, 1946, the Attorney General of the United States ordered petitioner deported because since his entry petitioner has been sentenced to a term of imprisonment more than once for a term of more than one year for the commission of crimes involving moral turpitude.

Petitioner petitioned the United States District Court, for the Northern District of California, for a writ of habeas corpus. The writ was denied by the District Court and thereafter petitioner appealed to the United States Circuit Court of Appeals for the Ninth District. On the 28th day of September, 1948, the Circuit Court of Appeals for the Ninth District affirmed the judgment of the District Court (Tr. p. 33) and on the same day the said Court affirmed the judgment of the District Court.

B.

JURISDICTION.

Jurisdiction of the District Court to entertain the Petition for Habeas Corpus is conferred by 28 U.S.C., Sections 451, 452.

Jurisdiction of the Circuit Court of Appeals to review the District Court's final Order Denying Habeas Corpus is conferred by 28 U.S.C., Section 463.

Jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C., Section 347). This Section provides as follows:

§347. *(Judicial Code, section 240, amended.) Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.* (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

C.

STATUTE INVOLVED.

The Act of February 5, 1917, as amended (8 U.S.C., Sec. 155(a)) so far as relevant to this proceeding, provides:

"* * * any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or

more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * *The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned,* * *"[1]

D.

QUESTIONS PRESENTED.

1. Whether petitioner may be lawfully deported from the United States without first affording him the opportunity to apply for and to be heard on his application for a pardon within the meaning, purpose and intent of 8 U. S. C. § 155(a) (Act of February 5, 1917, as amended).

2. Whether petitioner has been deprived of liberty or property without due process of law in ordering his deportation where his application for a pardon has not been finally determined or acted upon.

3. Whether the Attorney General, through the Immigration and Naturalization Service, has not heretofore recognized petitioner's right to apply for and be heard on his pardon application by granting ap-

[1]Italics ours unless otherwise stated.

pellant a stay of the deportation proceedings to apply for such pardon.

The reason relied on for the allowance of the Writ is that the point raised and urged by your petitioner has never been decided by this Honorable Court nor has this Court ever rendered any authoritative decision on the issues and questions presented by this petition.

Wherefore your petitioners pray that a writ of certiorari issue out of this Court to the Circuit Court of Appeals for the Ninth Circuit requiring that Court to certify and send to this Court a transcript of all the proceedings of such Circuit Court of Appeals for the Ninth Circuit had in this case; that the order and judgment of said Circuit Court of Appeals be reviewed and determined by this Court, and the order finally reversed and the cause remanded for further proceedings and further, that the petitioners be granted such other and additional relief as may be proper.

Dated, San Rafael, California,
December 22, 1948.

EMANUEL STAVROS HOUVARDAS,
Petitioner,
By CARLOS R. FREITAS,
Counsel for Petitioner.

JEROME A. DUFFY,
Of Counsel.

In the Supreme Court
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No.

EMANUEL STAVROS HOUVARDAS,
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vs.

I. F. WIXON, District Director of Immigration and Naturalization,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petitioner is a native of Greece. There is no dispute as to his alienage nor as to the lawfulness of his entry. He arrived in the United States on the S.S. "King Albert" in the month of March or April, 1912, —some thirty-six years ago,—when he was an eighteen year old boy. Upon his arrival at the Port of New York, N.Y., he was duly admitted for permanent residence in the United States by the Immigration authorities at said Port. Immediately after his arrival

and clearance by the Immigration authorities the petitioner proceeded directly to the State of California where he has maintained continuous residence for the past thirty-six years. The petitioner is now fifty-four years of age.

Misfortune first overtook the petitioner when he was accused by the District Attorney of Los Angeles County, California, in 1939 of two counts of forgery of a fictitious name. He was tried and found guilty by the Court on both of these counts, execution of sentence was suspended and he was placed on probation for a period of five years.

Again in 1942 he was accused in Fresno County, California, of violating Section 288-a of the California Penal Code. He pleaded guilty to this charge, moved for probation, probation was denied and he was sentenced on April 14, 1942 to imprisonment in the California State Prison at San Quentin.

Thereafter, and on April 29, 1942, the Superior Court in and for the County of Los Angeles made and entered the following order concerning petitioner:

> "Probation having been heretofore revoked, the sentence imposed on February 14, 1939, committing the defendant to the California State Prison at San Quentin for the term prescribed by law as to each of Counts 1 and 2 *concurrently,* are placed into full force and effect. These sentences are ordered to run *concurrently* with State Prison sentence pronounced in Fresno County, which defendant is now serving."

On March 22, 1944, the California State Board of Prison Terms and Paroles made and entered an order fixing petitioner's term of imprisonment.

Petitioner was confined at the State Prison at San Quentin until January 23, 1945, when he was released on parole. His parole expired April 25, 1948. Petitioner has now paid in full the penalties imposed upon him for his misdeeds and he is once more a free man, his debt to society fully satisfied.

After his release from prison, and on or about September 12, 1946, petitioner, through his then attorney, sought to apply for a pardon for his crimes to Honorable Earl Warren, Governor of the State of California. The petitioner, through his then attorney, was advised by the Governor's secretary that petitioner's pardon application would be entertained only by the Governor upon compliance by the petitioner with the provisions of the Procedure for Restoration of Rights and Application for Pardon as set forth in Sections 4852.01 to 4852.2 of the Penal Code.[2]

At this stage of the record petitioner then found himself confronted with a provision of the pardon act, Section 4852.06 which provides:

> "No such petition (for a pardon) shall be filed until and unless the petitioner has *continuously* resided, after leaving prison, in the county in which it is filed for a period of not less than *three*

[2]These provisions were enacted at the 1943 regular session of the California Legislature and added to the Penal Code by Stats. 1943, Chap. 400, effective May 13, 1943. The act is commonly known as the "Deuel bill" and was initiated and sponsored by Governor Warren.

> *years* immediately preceding the date of filing the petition * * *"

It is at once apparent that petitioner, by virtue of this provision, became stalemated. His hands became legally tied and he was powerless to further attempt extricating himself from his predicament until he had first complied with the residential requirements of the statute. These requirements he fulfilled on January 23, 1948, and accordingly he is now free to pursue the first of the steps requisite to his application for a pardon.[3] On or after April 25, 1948, the termination date of his parole, petitioner will then be permitted to file his Petition for a Certificate of Rehabilitation and Pardon. (Penal Code Section 4852.18.) This petition is now on file.

The issues joined by the pleadings appear in the Transcript of Record on file herein. It would be repetitious and burdensome to this Honorable Court to restate the pleadings. Reference to the Record will disclose that the pleadings and the issues so raised thereby are essentially simple.

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[3]On February 27, 1948, petitioner filed with the County Clerk of Marin County, California, a Notice of Intention to Apply for Certificate of Rehabilitation and Pardon as required by Penal Code, Section 4852.01, and on the same date caused to be served upon the Chief of Police of the City of San Rafael, a certified copy of the notice of intention filed with the County Clerk. (Penal Code, Section 4852.02.)

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

From what heretofore has been related there becomes crystalized a simple, fundamental and vital issue, and an interpretation of the statute involved, which has not heretofore been passed upon or adjudicated by the Courts, is now called for. The issue is: *Whether an alien may be lawfully deported without first affording him the legal right to be heard on his application for a pardon. Conversely, may the government summarily banish or exile an alien from the country by cutting off his right to seek a pardon at a time when this right is in the orderly process of fruition; when the right is available to him; and when the right has not been exhausted?*

POINT I.

THE PLAIN INTENDMENT OF THE ACT OF FEBRUARY 5, 1917, IS THAT A PARDON BARS DEPORTATION.

> "The provision of this section (8 U. S. C. 155 (a) respecting the deportation of aliens convicted of a crime involving moral turpitude *shall not apply to one who has been pardoned,* * * *"

It clearly follows that executive clemency is distinctly intended by the Congress to operate as a complete bar to deportation. This is definitely recognized by the Courts, as was held in *U. S. ex rel. Kowalenski v. Flynn,* 17 F. (2d) 524, that disabilities growing out of an offense requiring deportation are removed by pardon.

In the Circuit Court the respondent's sole point of insistence was that the words of the statute "has been pardoned" must be taken literally, and the past tense having been employed, that the statute cannot be construed to mean a pardon in the future. This contention suggests the weird notion that a pardon is of no avail to an alien unless he is possessed of it at the very time he is served with a warrant of deportation, and possibly until he is in the act of being removed physically from the county. Let us analyze this absurdity.

At the outset, the section under discussion, is *penal* in its nature, and hence any doubt concerning the application thereof should be resolved favorably to the alien. See: *Wallis v. Tecchio,* 65 F. (2d) 250.

The following are some of the relevant rules on statutory interpretation:

> When unambiguous language in a statute produces ambiguous results or manifest injustice, the Court must give it an application reasonably within intent of law.
>
> *Tillinghast v. Tillinghast,* 25 F. (2d) 531.

It is well settled law that, where a strict construction of a statute leads to injustice, absurdity and incongruity, the Court will look to the purpose and the spirit of the statute in declaring its effect.

> *In re Cahn, Belt & Co.,* 27 App. D. C. 173;
> *Fields v. United States,* 27 App. D. C. 433;
> *United States v. Day,* 27 App. D. C. 458;
> *Moss v. United States,* 29 App. D. C. 188;

Garrison v. Dist. of Columbia, 30 App. D. C. 515;

Dist. of Columbia v. Dewalt, 31 App. D. C. 326.

In the case of *In re Cahn, Belt & Co.*, supra, at page 181, the Court quoted with approval from Lewis' Sunderland, Stat. Const. §633, as follows:

> "The *intent* is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. 'The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of a statute, when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose of the act.' ".
>
> "In pursuance of the general object of giving effect to the intention of the legislature, the Courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, *it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute.* Effect will be given the real intention even though contrary to the letter of the law. The rule of construction according to the spirit of the law is especially applicable where adherence to the letter *would result in absurdity or injustice,* or would lead to contradictions, *or would defeat the plain purpose of the act,* or where the provi-

sion was inserted through inadvertence. *In following his rule, words may be modified or rejected and others substituted,* or words and phrases may be transposed."

59 C. J. 964-968;

Fleischmann Constr. Co. v. U. S., 270 U. S. 349, 70 L. Ed. 624;

Barrett v. Van Pelt, 268 U. S. 85, 69 L. Ed. 857;

Takao Ozawa v. U. S., 260 U. S. 178, 67 L. Ed. 199;

Holy Trinity Church v. U. S., 134 U. S. 457, 26 L. Ed. 226;

U. S. v. Katz, 271 U. S. 354, 70 L. Ed. 986.

"In the interpretation of statutes Courts are not bound by *grammatical* rules, and may ascertain the meaning of words by the context."

In re Haines, 195 Cal. 605 at 613.

With the foregoing salutary rules in mind, it is at once plain that the words "has been pardoned" were not meant to be operative in their strict, literal or grammatical sense. Congress employed the words *generally,* to connote the idea that a pardon whenever lawfully obtained, *past, present or future,* effectively and automatically will place the alien beyond the reach of the Immigration authorities and remove the peril of deportation. Otherwise, an absurd result would follow and the intention of Congress rendered meaningless. For example: Let us assume the case of an alien, who since May 1, 1917, was sentenced to imprisonment for a crime involving moral turpitude.

While incarcerated the Immigration authorities notify the prison officials that they wish a hold placed on the alien prisoner. Upon completion of his sentence, he is immediately served with a warrant of deportation, taken before an Immigration Commissioner, heard and ordered deported. Wherein has the alien either the time, the opportunity or the right to apply for a pardon? Wherein is the intention of Congress allowed to be pursued in orderly and legal fashion?

Again, an alien has been once imprisoned for the type of crime denounced. He again is convicted of that class of crime and is undergoing a sentence of imprisonment. It would therefore follow, according to appellee's view of the statute, that the alien would have to obtain a pardon on his *first* conviction, or suffer *immediate* deportation after release for service of sentence on his *second* conviction. This is so, because it is conceivable that while undergoing sentence on his *second* conviction a deportation warrant could issue, a hearing held and deportation ordered, all at time while the alien was in penal custody, and powerless to either ask for or receive a pardon, so that upon his release he could be taken immediately by the Immigration authorities and without further adieu transported out of the country. Is this what Congress meant when it declared that a pardon bars deportation?

To otherwise hold, or to give effect to respondent's view of the construction to be given the statute, would in effect be placing the imprimatur of this Court on kidnapping by the Government.

POINT II.

TO DENY THE RIGHT TO LAWFULLY APPLY FOR A PARDON IS TO DENY THE RIGHT TO DUE PROCESS OF LAW.

The petitioner is not unmindful of the general rule in cases of this character, namely, that it is not the primary function of this Court to try the right of the alien to enter or remain in the United States, but the power of this Court is limited to ascertaining whether or not the record shows that the proceedings in the matter are either unfair or otherwise lacking in the essential elements of due process of law, or that the Immigration Authorities are proceeding on an erroneous view of the law. If it thus appears to this Court that the proceedings in the instant case reflect any interference with the petitioner's right to be fairly heard, then this Court must review the case. The statute in question by enumerating the conditions upon which deportation will lie naturally prohibits deportation in other cases. Therefore, when the record shows that the Immigration officials are exceeding their power by either departing from the plain intent of the statute or completely ignoring it, the alien may then properly demand his release from deportation upon habeas corpus.

The petitioner does not assert that he has any vested right to remain in this country, but he most vigorously asserts that he has the right to exhaust the rights conferred upon him by Congress. He asserts that he has the right to lawfully apply in accordance with law for a pardon. If deportation is permitted to cut off the orderly process of this alien's application for a par-

don, then the alien's right to due process of law as guaranteed is denied him.

It requires no citation of authority to sustain the principle that aliens, as well as citizens, are entitled to apply for, be heard upon and be granted pardons for their crimes.

To obtain a pardon it must be applied for. Other than the rare cases of a general amnesty, the essential act of applying for a pardon must be initiated by the person who hopes to be the recipient thereof. A pardon does not descend as grace from on High to a supine sinner. The Congress has not set forth in the statute any mode or procedure to be followed. These procedural matters and the minutia of detail there with connected are evidently left to the several states in accordance with their respective and various pardon statutes. However, there can be no mistake that Congress has definitely and emphatically declared that a pardon will relieve the alien from the dire consequences of deportation. *"Ubi Jus Ibi Remedium"* is the underlying thought of Congress in this respect.

Therefore, any interference with the orderly procedure toward the end of a proper presentation of petitioner's request for a pardon or the prevention from obtaining a hearing on his pardon application is a complete deprival of petitioner's liberty and property without due process of law.

POINT III.

THE IMMIGRATION SERVICE IN HERETOFORE STAYING DEPORTATION PROCEEDINGS TO AFFORD PETITIONER THE OPPORTUNITY TO APPLY FOR A PARDON, HAS CONCEDED THAT PETITIONER MAY NOT BE DEPORTED UNTIL HE HAS FIRST EXHAUSTED HIS RIGHT TO BE FULLY HEARD ON HIS PARDON APPLICATION.

The record shows (Petitioner's Exhibits "A" and "B" and Petitioner's Exhibit "A" in evidence) that heretofore the petitioner made application to the Immigration Service for a stay of the deportation proceedings (after a deportation warrant had issued) and that the proceedings were stayed to "afford opportunity" to "secure pardon" (Petitioner's Exhibit "A").

The Commissioner of Immigration, according to File No. 5-489275 in evidence as Petitioner's Exhibit "A", is of record as stating on May 16, 1946:

> "Subsequently, information was submitted showing that application for pardon in behalf of the alien was being made and the request is now made that deportation of the subject scheduled for May 17, 1946, be stayed. *Under the circumstances, this request may be granted.*"

The conduct of the Immigration Service in this respect calls for the application of the principles of contemporaneous construction, which when applied to the facts of the case at bar clearly demonstrates that the principle contended for by petitioners is definitely recognized and subscribed to by the respondent.

> "The contemporaneous construction placed upon a statute by the officers or departments

charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the Government, * * * and, while not generally controlling, where the case is not extreme and no vested rights are involved, such construction should not be disregarded or overturned except for the most cogent reasons and unless clearly erroneous. * * * The consideration to be accorded executive consideration is also especially weighty in the case of statutes prescribing penalties or levying impositions, where the executive construction has been in favor of the persons affected." 59 C. J. 1025.

This rule has been applied in numerous instances by United States Courts, among which cases are the following:

United States v. Jackson, 74 Law. Ed. 369;
Brewster v. Gage, 74 Law. Ed. 457, at p. 463.

The purpose of acquainting the Court with the foregoing rules relative to contemporaneous construction is the fact that under date of May 14, 1946 the petitioner's then counsel, by telegram to the head of the Immigration and Naturalization Service at Philadelphia, Pa., in view of then imminent deportation proceedings, made application for a re-opening of the case and likewise for a stay of proceedings upon the further ground that petitioner was taking steps to seek a pardon.

Thereafter and on May 16, 1946, the Assistant Commissioner of the Immigration and Naturalization

Service by telegram advised petitioner's then counsel that the deportation of the petitioner was stayed thirty days to afford opportunity to secure a pardon.

Thereafter, by letter the Immigration Service was advised that the thirty day extension was not sufficient in view of the laws of California relative to the applications for pardons and additional time was sought to accomplish this purpose, but the Immigration Service did not see fit to grant additional time.

We believe that the Immigration Service, in acting on the request to apply for a pardon, recognized the right of an alien to apply for a pardon, and by its acts in granting a stay of proceedings to apply for the pardon, has placed a construction upon the terms of the statute in question as contended for by the petitioner, namely, the Department has recognized by its own affirmative act the right to apply for a pardon. We believe that the doctrine of contemporaneous construction, therefore, becomes applicable.

CONCLUSION.

Diligent research has failed to find any case construing the particular phrase of the statute in question. The point, raised by the petitioner, therefore, is one of first impression, the answer to which is of momentous import to the petitioner. Deportation to Greece during these perilous times would be in effect the exiling of the petitioner to a foreign land. For thirty-six years he has lived in this country and has

become Americanized in his way of life. Every humane instinct rebels at the thought of an alien in such an unfortunate web of circumstance being summarily banished from this country when legal rights are still available to him to prevent his deportation.

We can find no more pungent expression evaluing the intent of the Congress as to the very section in question than that employed by Mr. Justice Douglas in the recent case of *Tan v. Phelan,* Opinion No. 370, October Term, 1947, decided February 2, 1948:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael,* 333 U. S. ..... It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.
>
> Reversed."

Dated, San Rafael, California,
December 22, 1948.

Respectfully submitted,

CARLOS R. FREITAS,
Counsel for Petitioner.

JEROME A. DUFFY,
Of Counsel.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 479

EMANUEL STAVROS HOUVARDAS, PETITIONER

v.

I. F. WIXON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 24-28) is reported at 169 F. 2d 980.

JURISDICTION

The judgment of the Court of Appeals was entered September 28, 1948 (R. 29). The petition for a writ of certiorari was filed December 27, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether an alien who has twice been sentenced to imprisonment for more than one year for crimes

involving moral turpitude may be deported before he has exhausted recourse to the state pardon laws.

STATUTE INVOLVED

Section 19(a) of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended (8 U. S. C. 155(a)), provides in pertinent part:

> Sec. 19(a) * * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, * * *.

STATEMENT

On July 10, 1947, petitioner filed in the District Court for the Northern District of California a petition for a writ of habeas corpus (R. 2-12) challenging the legality of his detention by respondent pursuant to an order of deportation issued March 18, 1946. Petitioner alleged that in March or April, 1912, he was admitted to this country from Greece for permanent residence (R. 2), and that since that time he has resided continuously in California (R.

3); that in February 1939, in the Superior Court of the State of California for the County of Los Angeles, he was convicted on two counts of an information charging forgery of a fictitious name and was sentenced on each count to imprisonment in the state prison "for the term prescribed by law,"[1] the sentences to run concurrently; that execution of this sentence was suspended and he was placed on probation for a period of five years, subject to the conditions that he pay a fine of $200 and serve the first ten months of his probation in the county jail (R. 3-4; Pet. 8); that on April 14, 1942, in the Superior Court of the State of California for the county of Fresno, he was sentenced on his plea of guilty to an information charging oral sex perversion to imprisonment in the state prison "until legally discharged" (R. 4; see Pet. 8 and § 288a, Cal. Penal Code);[2] that on April 28, 1942, the Superior Court for the County of Los Angeles revoked his probation in the first case and directed execution of the sentence, to run concurrently with the sentence imposed in the Fresno County Superior Court (R. 5); that on March 22, 1944, the State Board of Prison Terms and Paroles, California State Prison, San Quentin, California, fixed his term of imprisonment at "10 yrs. & 10 Yrs. & 10 Yrs. CC." from the date of his original

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[1] This offense is punishable by imprisonment in the state prison for not less than one nor more than fourteen years, or by imprisonment in the county jail for not more than one year (§ 473, Cal. Penal Code).

[2] This offense is punishable by imprisonment for not exceeding fifteen years (§ 288a, Cal. Penal Code).

commitment, April 15, 1942, with credits for good behavior as provided by law;[3] and that he was released on parole January 23, 1945, the parole to expire January 23, 1948 (R. 6-7). Petitioner further alleged that he was still under the supervision of the Parole Officer of the State of California, and that under California law he was not entitled to apply for a pardon until three years after his release from imprisonment, or January 23, 1948 (R. 8-9).[4] Relying on the provision of Section 19 (a) of the Immigration Act of 1917 exempting from deportation aliens who have been pardoned (*supra*, p. 2), petitioner asserted that the immigration authorities acted beyond their authority in directing his deportation before he had an opportunity to apply for a pardon (R. 9-10).

An order to show cause issued (R. 13), and respondent filed a return in which he relied upon the warrant of deportation dated March 18, 1946, and the record of the deportation proceedings (R. 14). On November 4, 1947, the order to show cause was discharged and the petition denied (R. 15), and on September 28, 1948, the order of the district

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[3] The California courts do not fix the term of imprisonment (§ 1168, Cal. Penal Code); such term is fixed by the Board of Prison Terms and Paroles (§ 3020, Cal. Penal Code).

[4] Sec. 4852.06 of the California Penal Code provides:

"No such petition [for a pardon] shall be filed until and unless the petitioner has continuously resided, after leaving prison, in the county in which it is filed for a period of not less than three years immediately preceding the date of filing the petition * * *."

court was affirmed by the Court of Appeals for the Ninth Circuit (R. 29).

ARGUMENT

Petitioner contends that although he had not been pardoned at the time he was ordered deported and did not, therefore, come within the literal terms of the statutory exemption, it would be contrary to the meaning, purpose and intent of the statute and would therefore constitute a denial of due process of law to deport him before he has had an opportunity to comply with the state law requirements for obtaining a pardon (Pet. 4-5). He argues that notwithstanding the plain language of the statute, Congress meant to exempt from deportation not only those twice-convicted and sentenced aliens who actually had been pardoned, but also those who might at some future time be eligible for a pardon (Pet. 14-15). In effect, he claims the statutory exemption applies to those who have not yet been denied a pardon. We think this contention is patently without merit. The absurd results which would follow such a construction of the statute are obvious. No alien, otherwise subject thereto, would be deportable under the statutory provision in question until his application for a pardon had been submitted to and denied by the appropriate state authority. It could even be urged, under petitioner's construction, that denial of a pardon by one state governor is not conclusive because a pardon might still be obtained from his

successor in office. Thus deportation could be resisted indefinitely.[5]

As pointed out by the court below (R. 26-27), the plain language of the statute is consistent with, and clearly reflects, the true Congressional intent. While there is nothing bearing directly on the present issue in the legislative history of the 1917 Act, the House Committee on Immigration and Naturalization, reporting favorably on S. 5094[6] which became the Act of March 4, 1929, 45 Stat. 1551, 8 U. S. C. 180b, stated:

> In the case of prisoners released on parole under convictions by State courts, it was the practice of the department until recently to take the prisoner into custody immediately on his parole if deportable for any reason. Objections were made by one of the States to this practice, on the ground that it was an infringement on the right of the State to retain custody of the prisoner during the period he is out on parole. The Solicitor of the Department of Labor recently advised the Secretary of Labor that the statute did not authorize the practice of the department, and accord-

[5] In this case, as the court below observed (R. 26), the hands of the Immigration and Naturalization Service would be tied for at least three years by the residence requirement, and, we might add, possibly for a considerably longer period by virtue of the provisions of Section 4852.03, Cal. Penal Code, permitting the Judicial Council to fix a rehabilitation period depending on the severity of the sentence imposed and whether the felon has been convicted of multiple crimes, as well as the provision in Section 4852.16, Cal. Penal Code, that a recommendation in writing from a majority of the judges of the Supreme Court is a prerequisite to the pardoning of a twice-convicted felon.

[6] See H. Rep. 2418, 70th Cong., 2d sess., p. 8.

> ingly it has been discontinued so that under the present law the alien is not deported until the end of the term for which sentenced or until he is unconditionally released from confinement. Your committee is convinced that the law should be made clear that the alien is deportable immediately upon his release from confinement. If he belongs to a deportable class he should be deported even though it may not be against the public policy of the State, under whose laws he has been convicted, that he should be allowed to go at large on parole. The authority of Congress in relation to the deportation of aliens is supreme and the law or practice of a State cannot and should not allow an alien to remain in this country for a moment longer than permitted by act of the National Legislature, which alone is charged with the duty and responsibility of ridding the country of undesirable aliens. Accordingly, section 5 of the bill [7] provides that the alien may be deported immediately upon his release on parole.

If, as this report plainly indicates, it was the intent of Congress not to defer deportation during the parole period, it would be most illogical and "a rather complete example of judicial legislation" (see R. 26) to infer a contrary intent with regard

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[7] Now Section 3 of the Act of March 4, 1929, *supra*, which provides:

"An alien sentenced to imprisonment shall not be deported under any provision of law until after the termination of the imprisonment. For the purposes of this section the imprisonment shall be considered as terminated upon the release of the alien from confinement, whether or not he is subject to rearrest or further confinement in respect of the same offense."

to the more indefinite period within which a pardon might be secured.[8]

Petitioner also contends (Pet. 18-20) that the Commissioner of Immigration recognized the correctness of petitioner's interpretation of the statute when he granted a stay of deportation for thirty days upon being informed that petitioner was making application for a pardon. We think it is clear, however, that the Commissioner's action merely reflected a willingness to afford a reasonable time for petitioner to obtain a pardon or for the state authorities to effect a pardon (see Pet. 18),[9] although the Commissioner was under no obligation to do so.[10] Petitioner, therefore, was granted some-

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[8] There is thus no substance in petitioner's argument (Pet. 16-17) that his deportation now would be a denial of due process of law because Section 19(a) of the Immigration Act guarantees him the right to exhaust all possibilities of obtaining a state pardon. This argument is based on petitioner's interpretation of the law, and, as we have shown, that construction is not justified by the wording of the statute, by reason and logic, or by the legislative history of related provisions.

[9] The California law heretofore cited which permits application for a pardon following release from imprisonment and three years residence in the county was enacted in 1943 as "an additional, but not exclusive, procedure for * * * application for pardon". Sec. 4852.19, Cal. Penal Code. It did not affect the Governor's general authority to grant pardons (Sec. 4800, Cal. Penal Code) or the right of the State Board of Prison Directors and the Board of Prison Terms and Paroles to recommend pardons in deserving cases (Sec. 4801, Cal. Penal Code).

[10] See *United States* v. *Bromberg*, 61 F. Supp. 1021 (W. D. Pa.), wherein, on August 9, 1945, the alien, who was at liberty on parole after serving his minimum sentence for murder, was held to be deportable, even though under Pennsylvania law he was automatically entitled to a full pardon at the expiration of his maximum sentence on December 5, 1948. Before

thing to which he was not entitled as of right. His present attempt to attribute to the Commissioner's action the persuasive effect usually accorded a long followed administrative application of an ambiguous or doubtful statute is frivolous.[11]

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he was actually deported the Governor of Pennsylvania commuted his maximum sentence to expire December 15, 1945, by virtue of which the same court held he had been pardoned and was not deportable. *United States* v. *Garfinkel*, 69 F. Supp. 846 (W. D. Pa.). There was no comparable action by the State of California in the instant case, nor any indication that the State objects to the proceedings to deport petitioner (see R. 28). In fact, petitioner admits (Pet. 9) that he was advised in September 1946, approximately six months after the order for his deportation was issued, that the Governor would not consider an application for a pardon except in accordance with the provisions of the 1943 statute referred to in footnote 9, *supra*. It should also be pointed out that the situation has changed since this proceeding was instituted in the district court. More than three years have elapsed since petitioner was released from imprisonment and he says (Pet. 10, fn. 3) that he has invoked the provisions of the 1943 statute. We are not advised of the present status of that proceeding.

[11] Petitioner is a twice convicted and sentenced alien within the meaning of Section 19(a) of the Immigration Act of 1917 as construed by this Court in *Fong Haw Tan* v. *Phelan*, 333 U. S. 6. He is a "repeater"—he committed a crime involving moral turpitude and was convicted and sentenced, and three years later he was again convicted and sentenced in another court for another crime of that nature. While the first sentence did not go into execution until after his second conviction and sentence and was then ordered to be served concurrently with the second sentence, still he comes within the clear intendment of Congress to deport recidivists. 333 U. S. at 9-10.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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